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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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09/14/2005

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EXAMINER

DOUYON, LORNA M

ART UNIT

PAPER NUMBER

1796

NOTIFICATION DATE

DELIVERY MODE

02/19/2010

ELECTRONIC

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

gbpatent@gbpatent.com  
pto@gbpatent.com

<b>Office Action Summary</b>	<b>Application No.</b> 10/523,438	<b>Applicant(s)</b> ALBRECHT ET AL.	
	<b>Examiner</b> Lorna M. Douyon	<b>Art Unit</b> 1796	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 17 November 2009.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 21-43 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 21-43 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |   |   |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                    | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)         | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____   | 6) <input type="checkbox"/> Other: _____                          |

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1. This action is responsive to the amendment filed on November 17, 2009.
2. Claims 21-43 are pending. Claim 21 is currently amended.
3. The rejection of claims 21-24, 27-28, 31-37 under 35 U.S.C. 103(a) as being unpatentable over Lee et al. (US Patent No. 6,992,054) is withdrawn in view of Applicants' amendment.
4. The rejection of claims 25-26 under 35 U.S.C. 103(a) as being unpatentable over Lee as applied to the above claims, and further in view of McAtee et al. (US 2002/0009484) is withdrawn in view of Applicants' amendment.
5. Claims 21-43 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Kaneda et al. (US 2001/0046948), hereinafter "Kaneda" in view of McAtee et al. (US 2002/0009484), hereinafter "McAtee" for the reasons set forth in the previous office action.
6. Claims 21-25, 27, 29-35, 38-39 and 42 stand rejected under 35 U.S.C. 103(a) as being obvious over Drucks et al. (US 2002/0102289), hereinafter "Drucks" for the reasons set forth in the previous office action.

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7. Claims 26, 28, 36-37, 40, 41 and 43 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Drucks as applied to the above claims, and further in view of McAtee for the reasons set forth in the previous office action.

### ***Response to Arguments***

8. Applicants' arguments filed November 11, 2009 have been fully considered but they are not persuasive.

With respect to the obviousness rejection based upon Kaneda in view of McAtee, Applicants argue that given the fact that the cleansing material (emulsion) of Kaneda has "an excellent cleansing effect on various makeup stains" this document fails to provide any apparent reason for one ordinary skill in the art to provide a foaming emulsion. Applicants also argue that the concentration of the oily component in the emulsion of Kaneda is preferably at least 10%, more preferably at least 20% by weight, and that the compositions of Examples 1-4 relied on by the Examiner all comprise at least 45% by weight of oily component, and it is not seen that with such high concentrations of oily component (and relatively low concentration of surfactants) it would even be possible to prepare a foaming composition.

The Examiner respectfully disagrees with the above arguments because in paragraph [0020] on page 2, Kaneda teaches anionic surfactants like  $\alpha$ -olefinsulfonate-type surfactants, acylated amino acid-type surfactants and alkylphosphoric acid ester-type surfactants as those recited in claim 21 component (a), with proportions that overlap those recited (i.e. 0.5 to 10% by weight; see paragraph 0019 on page 2), hence,

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the emulsion of Kaneda should also be foaming because similar anionic surfactants have been utilized. "Products of identical composition can not have mutually exclusive properties." A chemical composition and its properties are inseparable. Therefore, if the prior art teaches the identical chemical structure, the properties applicant discloses and/or claims are necessarily present. *In re Spada*, 911 F.2d 705, 709, 15 USPQ2d 1655, 1658 (fed. Cir. 1990). See MPEP 2112.01 II. In addition, the oily components of Kaneda are not excluded from the "comprising" language of the present claims. Even if presuming the oily components of Kaneda affects foaming, this term is a relative term, with no meets and bounds, hence, this term still reads on, at least, "low" foaming. The fact remains that Kaneda teaches anionic components with overlapping ranges, hence, as stated above, the properties applicant discloses and/or claims are necessarily present.

Applicants also argue that none of the compositions of Examples 1-4 of Kaneda relied on by the Examiner contains any of the nonionic and anionic surfactants which are recited in the present claims, and it is not seen that the weight ratio of anionic to nonionic surfactants in the Examples of Kaneda renders obvious a weight ratio of anionic and nonionic surfactants which are completely different from the surfactants employed by Kaneda.

The Examiner respectfully disagrees with the above argument because a reference is not limited to the working examples, see *In re Fracalossi*, 215 USPQ 569 (CCPA 1982). The Examples are relied upon to show the relationship of the weight ratio of anionic and nonionic surfactants. Even though Kaneda does not explicitly disclose

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the specific nonionic surfactants as those recited, McAtee, the secondary reference, teaches the equivalency of the alkoxylated fatty acid esters of Kaneda (see paragraph 0020 on page 2) with alkyl polyglucosides as nonionic surfactants (see paragraph 0126 on page 10 of McAtee), for example, decyl polyglucoside and lauryl polyglucoside (see paragraph 0127 on page 10). Hence, it would have been obvious to one of ordinary skill in the art at the time the invention was made to substitute the polyoxyalkylene fatty acid esters of Kaneda with alkyl polyglucosides, like decyl polyglucoside and lauryl polyglucoside, because the substitution of art recognized equivalents as shown by McAtee is within the level of ordinary skill in the art. In addition, simple substitution of one known element (i.e., alkoxylated fatty acid esters) for another (i.e., alkyl polyglucosides) would achieve the predictable result of providing nonionic surfactants with cleansing properties.

Applicants also argue that there is no convincing explanation why McAtee would motivate one of ordinary skill in the art to replace a single one of the several examples of nonionic surfactants set forth in paragraph [0020] of Kaneda, i.e., polyoxyalkylene fatty acid esters (not employed in any of the Examples of Kaneda) by a one of the several nonionic surfactants mentioned in paragraph [0126] of McAtee, i.e., alkyl polyglucosides, and to combine the latter with one or more selected anionic surfactants mentioned in the long list of exemplary anionic surfactants mentioned in paragraph [0020] of Kaneda (none of which is employed in any of the Examples of Kaneda, either).

The Examiner respectfully disagrees with the above argument because, as stated in the previous office action, Kaneda and McAtee are analogous art, each

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teaching compositions for cleansing skin, and McAtee was relied upon in his teachings of equivalency of one nonionic surfactant, i.e. alkoxyated fatty acid esters, with another nonionic surfactant like alkyl polyglucosides. Hence, the substitution of one known nonionic surfactant for another known nonionic surfactant, is likely to be obvious when it does no more than yield predictable results. Absent a showing of criticality of the recited components and their respective proportions, the obviousness rejection based upon Kaneda and McAtee is maintained.

With respect to the obviousness rejection of claims 21-25, 27, 29-35, 38-39 and 42 based upon Drucks, Applicants argue that it is only with hindsight that one can conclude that Drucks provides an apparent reason for one of ordinary skill in the art to employ mixtures of surfactants which belong to different classes and in particular, to combine nonionic and anionic surfactants. Applicants also argue that it is not seen that Drucks teaches or suggests that the weight ratio of (any) two different classes of surfactants (such as, e.g., anionic and nonionic surfactants) is a result-effective variable, wherefore the question arises what would have prompted one of ordinary skill in the art to optimize a weight ratio of the anionic surfactants recited in the present claims to nonionic surfactants and in particular, alkyl polyglycosides to arrive at the weight ratios recited in, e.g., present claims 22 and 23

In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was

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within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971). Drucks teaches wipes which comprise one or more washing-active surfactants from the group of anionic, cationic, amphoteric and nonionic surfactants (see paragraphs 0032-0069 on pages 2-3) and the content of the one or more washing-active surfactants is chosen from the range from 5 to 25% by weight based on the total weight of the impregnation solution (see paragraph 0071 on page 3). Drucks teaches specific surfactants such as acylamino acids and salts thereof (see paragraph 0034 on page 2), di-TEA-palmitoyl aspartate and sodium caprylic/capric glutamate (see paragraph 0035 on page 2); sarcosinates (see paragraph 0037 on page 2); phosphoric acid esters and salts (see paragraph 0043 on page 3); olefinsulphonates; or sulfosuccinates (see paragraphs 0047-0048 on page 3), and alkyl polyglycosides such as lauryl glycoside, decyl glycoside and cocoglycoside (see paragraph 0069 on page 3). In addition, it is *prima facie* obvious to combine two compositions each of which is taught by the prior art to be useful for the same purpose, in order to form a third composition to be used for the very same purpose, see *In re Kerkhoven*, 626 F.2d 846, 850, 205 USPQ 1069, 1072 (CCPA 1980). As to the respective proportions of the anionic and nonionic surfactants, optimization through routine experimentation is within the level of ordinary skill in the art. As to optimization results, a patent will not be granted based upon the optimization of result effective variables when the optimization is obtained through routine experimentation unless there is a showing of unexpected



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results which properly rebuts the prima facie case of obviousness. See *In re Boesch*, 627 F.2d 272,276,205 USPQ 215,219 (CCPA 1980).

With respect to the obviousness rejection of claims 26, 28, 36-37, 40, 41 and 43 based upon Drucks in view of McAtee, Applicants argue that these claims are dependent claims and are thus, not rendered obvious for at least all of the reasons which are set forth with respect to the rejection of independent claims 21 and 38 in view of Drucks.

The above response applies here as well.

### ***Conclusion***

9. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

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10. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Lorna M. Douyon whose telephone number is 571-272-1313. The examiner can normally be reached on Mondays-Fridays 8:00AM-4:30PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Harold Pyon can be reached on 571-272-1498. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Lorna M Douyon/  
Primary Examiner, Art Unit 1796